11-1700-8904-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by
David Beaulieu, Commissioner,
Department of Human Rights,

Complainant,

vs.

Jack Bailey and Oralee J. Bailey,
d/b/a Union Lake Sarah Campground,

Respondents.

ORDER REGARDING
RESPONDENT'S MOTION
FOR SUMMARY JUDGMENT

This matter is before Administrative Law Judge Barbara L. Neilson on a Motion for Summary Judgment filed by the Respondents. Andrea Mitau Kircher, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Complainant. Greg Widseth, Attorney at Law, Odland, Fitzgerald & Reynolds, First American Bank Building P.O. Box 457, Crookston, Minnesota 56716, appeared on behalf of the Respondents, Jack Bailey and Oralee J. Bailey, d/b/a Union Lake Sarah Campground. The record with respect to the summary judgment motion closed o November 7, 1994, when the last memorandum was received.

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Ju makes the following:

ORDER

The Respondent's Motion for Summary Judgment is hereby DENIED.

Dated this ____ day of November, 1994.

BARBARA L. NEILSON

Administrative Law Judge

MEMORANDUM

In the Complaint in this matter dated June 15, 1994, the Complainant alleges that the Respondents discriminated against Liane D. Olson (now known Liane Kaml) on the basis of sex during her employment at Union Lake Sarah Campground in the summer of 1991. The Complainant specifically alleges that "Jack Bailey inflicted upon his female employees unwelcome sexual advances, sexually motivated contact, and physical contact of a sexual nature" includi but not limited to "proposing that Ms. [Kaml] have sexual intercourse with h and threatening to rip off her shorts" and, upon Ms. Kaml's refusal, orderin her not to wear shorts at the Campground. The Complainant further alleges t the conduct substantially interfered with Ms. Kaml's conditions of employmen and that Ms. Kaml resigned the Campground position and her other job cleanin house for Ms. Bailey due to the hostile work environment and Mr. Bailey's offensive conduct. The Complainant asserts that this conduct constitutes sexual harassment and sex discrimination against Ms. Kaml in violation of th Minnesota Human Rights Act. In their Motion for Summary Judgment, the Respondents argue that the Complainant cannot demonstrate the requisite prim facie elements of any of its claims.

Summary disposition is the administrative equivalent of summary judgmen See Minn. Rules pt. 1400.5500 (K) (1993). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party entitled to judgment as a matter of law. Sauter v. Sauter, **70** N.W.2d 351, 3 (Minn. 1955); Minn. R. Civ. P. 56.03 (1984). A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affe the result or outcome of the case. Illinois Farmers Insurance Company v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minneso Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary disposition, the non-moving party must show that specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). existence of a genuine issue of material fact must be established by the non moving party by substantial evidence; general averments are not enough to me the non-moving party's burden under Minn. R. Civ. P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. Ct. App. 1988). The evidence presented to defeat a summary judgment motion, however, need no be in a form that would be admissible at trial. Carlisle, 437 N.W.2d at 715 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). The non-moving party also has the benefit of that view of the evidence which is most favora

to him and all doubts and inferences must be resolved against the moving party. See, e.g., Celotex, 477 U.S. at 325; Thiele v. Stich, 425 N.W.2d 580 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971); Thompson v. Campbell, 845 F. Supp. 665, 672 (D. Minn. 1994). If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 2 51 (1986).

Based upon the pleadings, affidavits, and depositions submitted in this matter, and construing the facts in a light most favorable to the Complainan the underlying facts in this matter appear to be as follows. Jack and Orale Bailey own Union Lake Sarah Campground ("the Campground"). Mr. Bailey's brother and his brother's wife have an interest in the real estate but have nothing to do with the operation of the Campground. Mr. Bailey considers himself to be the employer of the Campground employees; Ms. Bailey presently has no duties at the Campground but has worked there at times in the past. Kaml initially was hired by Ms. Bailey in approximately April 1991 to clean Baileys' home. In May 1991, she began working at the Campground at minimum wage as a store clerk. Shortly after commencing her employment with the Campground, Ms. Kaml's compensation was increased to $5.00 per hour. Her duties involved preparing the work schedules for all the employees and handl the bookkeeping for the campground, as well as store clerk duties and other chores that needed to be done at the campground. Due to the seasonal nature the work, Ms. Kaml worked long hours during the summer months. She primaril worked with Mr. Bailey, who ran the Campground operations. They developed a good working relationship during the summer. On two or three occasions, Mr Bailey hugged Ms. Kaml. At the time, she did not find the hugs inappropriat Ms. Kaml stated that she believed that she and her employer had a relationsh in which they treated each other with respect.

On August 12, 1994, Jack Bailey was doing some cement work at the Campground during approximately mid-day. After the cement had been set, Mr Bailey requested that Ms. Kaml assist him in cleaning off the boards. According to Ms. Kaml, Mr. Bailey then told her that there was something tha he had wanted to ask her for quite some time. He first told her that she needed to promise not to tell anyone about it, including Mr. Bailey's wife, Kaml's husband, and her friends Judy Stock and Joy Havercamp. Ms. Kaml said that she would not talk to them but stated that she usually liked to know wh the information was before she made such a promise. Ms. Kaml alleges that M Bailey then proceeded to give what sounded like a prepared speech. He said that a man can make it through life if he enjoys either his work or his home Mr. Bailey told Ms. Kaml that he had enjoyed his work as an engineer, but no he was done with that type of work. He enjoyed his children, and they made home life bearable, but now his children lived elsewhere. He said that he didn't really have much enjoyment at all in his life now and that his wife didn't care about anything that was important to him. Mr. Bailey then state that he "needed to talk to someone for an afternoon, about three or four hou

and not just talk but be intimate also." Mr. Bailey said that he liked Ms. Kaml a lot and knew that she would be "just what he needed" and that he "cou hardly keep his hands off of [her] any more" and that he wanted "to rip [her shorts off." He then asked, "So as a favor to me, will you do it?" Ms. Kam refused. A customer then came into the store and Ms. Kaml entered the store wait on the customer. When Ms. Kaml and Mr. Bailey were alone again, Mr. Bailey asked her if she could fix him up with Joy, one of her friends. She again refused. Either at that time or several days later, Mr. Bailey told M Kaml that she would have to quit wearing shorts to work or that it would be good idea if she did not wear shorts to work anymore. Sometime either that or subsequently, Mr. Bailey asked Ms. Kaml if she was planning to terminate employment at the Campground and he stated that he did not want her to leave the job. At that time, Ms. Kaml stated that she didn't know and would have think about it.

Ms. Kaml understood Mr. Bailey's use of the term "intimate" to mean sexual. Mr. Bailey agrees that Ms. Kaml's statement in the second paragraph her discrimination charge, in which she sets forth a portion of her August 1 conversation with Mr. Bailey, is "essentially true." Deposition of Jack Bai at 34. He admits that he intended his remarks to be a request that Ms. Kaml have sexual intercourse with him. Ms. Kaml alleges that she found the sexua request to be offensive and was frightened when Mr. Bailey said that he want to rip her shorts off.

After the August 12, 1991, incident, Ms. Kaml worked the following date and times: (1) August 13, 1991, from 8:00 a.m to 6:00 p.m.; (2) August 17 for one hour; (3) August 18 for 45 minutes; (4) August 19 for 12 hours; (5) August 20 for 10 hours; and (6) August 21 for five hours. Prior to August 12th, Ms. Kaml alleges that she had been trusted to do the payroll an scheduling and was in charge of paying the bills and doing the actual bookkeeping and felt that she was trusted to do her job. Based upon Mr. Bailey's conduct after August 12, she felt that he did not trust her to take care of some of these more important duties. Ms. Kaml alleges that Mr. Bail was more critical of her work performance following the August 12 incident a that Mr. Bailey reduced her responsibilities by taking over her bookkeeping scheduling duties. Ms. Kaml testified in her deposition that she felt that Bailey did not view her as a valued employee but rather as a sexual object. She decided that it was necessary to quit her employment.

On August 21, Ms. Kaml resigned from her employment at Union Campground She left a letter of resignation at the Campground for Mr. Bailey in which s stated she did not feel comfortable working for him anymore. She gave him a address to send her paycheck and asked him to not get in touch with her anymore. Subsequently, Mr. Bailey sent Ms. Kaml her paycheck along with a n dated August 22, 1991, in which he stated, "Thanks again for helping this summer. I can honestly say I couldn't have made it without you. If you cha your mind we still need you over Labor Day weekend, and there are many table

to paint in September. Please!" Bailey Deposition, Ex. 4. Ms. Kaml asser that she was constructively discharged from her position on August 21, 1991 She filed a charge of discrimination with the Minnesota Department of Human Rights on or about April 15, 1992.

The Minnesota Human Rights Act ("MHRA" or "the Act") specifies that, except when based on a bona fide occupational qualification, it is an unfai employment practice for an employer to discharge an employee because of sex otherwise discriminate against an employee because of sex with respect to "hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. § 363.03, subd. 1(2) (1992). The MH specifies that discrimination based on sex includes "sexual harassment." Mi Stat. § 363.01, subd. 14 (1992). "Sexual harassment" is defined in the stat as follows:

> "Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:
>
> (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment . . . ;
>
> (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment . . . ; or
>
> (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . **or** creating an intimidating, hostile, or offensive employment . . . environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Minn. Stat. § 363.01, subd. 41 (1992) (emphasis added).

Minnesota courts have often relied upon federal case law developed in discrimination cases arising under Title VII of the Civil Rights Act of 1964 interpreting the MHRA. See, e.g., Continental Can Co. v. State, 297 N.W.2d 241, 246 (Minn. 1980); Danz v. Jones, 263 N.W.2d 395, 398-99 (Minn. 1978)). Relevant Minnesota case law establishes that plaintiffs in employment discrimination cases arising under the MHRA may prove their case either by presenting direct evidence of discriminatory intent or by presenting circumstantial evidence in accordance with the analysis first set out by the

United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 79
802-03 (1973). Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701, 710 & n
(Minn. 1992); Sigurdson v. Isanti County, 386 N.W.2d 715, 719 (Minn. 1986);
Danz v. Jones, 263 N.W.2d at 399.

The approach set forth in McDonnell Douglas consists of a three-part analysis which first requires the complainant to establish a prima facie cas of disparate treatment based upon a statutorily-prohibited discriminatory factor. Once a prima facie case is established, a presumption arises that t respondent unlawfully discriminated against the complainant. The burden of producing evidence then shifts to the respondent, who is required to articul a legitimate, nondiscriminatory reason for its treatment of the complainant If the respondent establishes a legitimate, nondiscriminatory reason, the burden of production shifts back to the complainant to demonstrate that the respondent's claimed reasons were pretextual. McDonnell Douglas, 411 U.S. a 802-04; see also Texas Department of Community Affairs v. Burdine, 450 U.S. (1981); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978);Anderson v Hunter, Keither, Marshall & Co., 417 N.W.2d 619, 623 (Minn. 1989); Hubbard v United Press International, Inc., 330 N.W.2d 428 (Minn. 1983). The burden o proof remains at all times with the complainant. Fisher Nut Co. v. Lewis ex rel. Garcia, 320 N.W.2d 731 (Minn. 1982); Lamb v. Village of Bagley, 310 N.W 508, 510 (Minn. 1981).

It is clear that the three-part McDonnell Douglas analysis is to be applied to deciding summary judgment motions involving claims allegeing disparate treatment in violation of the MHRA. Albertson v. FMC Corp., 437 N.W.2d 113, 115 (Minn. Ct. App. 1989), citing Sigurdson, 386 N.W.2d at 719- see also Rademacher v. FMC Corp., 431 N.W.2d 879, 882 (Minn. Ct. App. 1988) Shea v. Hanna Mining Co., 397 N.W.2d 362, 368 (Minn. Ct. App. 1986). The U Court of Appeals for the Eighth Circuit has cautioned that "[s]ummary judgme should be sparingly used [in cases alleging employment discrimination] and t only in those rare instances where there is no dispute of fact and where the exists only one conclusion . . . . All the evidence must point one way and susceptible of no reasonable inference sustaining the position of the non-moving party. Johnson v. Minnesota Historical Society, 931 F.2d 1239, 1244 (8th Cir. 1991), relying upon Hillebrand v. M-Tron Industries, Inc., 827 F.2 363, 364 (8th Cir. 1987), cert. denied, 488 U.S. 1004 (1989), and Holley v. Sanyo Manufacturing, Inc., 771 F.2d 1161, 1164 (8th Cir. 1985).

As noted above, the Respondents' Motion for Summary Judgment is based u the grounds that the Complainant cannot establish a prima facie case of sex discrimination. The elements of a prima facie case of discrimination vary depending upon the type of discrimination alleged, and must be tailored to t the particular circumstances.
In the present case, the Complainant alleges that Ms. Kaml was sexually harassed under both the quid pro quo and hostile environment theories. A pr facie case under the hostile environment theory is established by showing th

(1) the employee belongs to a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition or privilege of employment or created intimidating, hostile, or offensive working environment; and (5) the employ knew or should have known of the harassment. Bersie v. Zycad Corp., 399 N.W 141, 146 (Minn. Ct. App. 1987), citing Henson v. City of Dundee, 682 F.2d 89 903-05 (11th Cir. 1982). The fifth element may include a further requiremen that the employer failed to take remedial action. Klink v. Ramsey County, 3 N.W.2d 894, 901 (Minn. Ct. App. 1986).

In this proceeding, it is evident that Ms. Kaml is female and thus belo to a protected group. Accordingly, the Complainant has satisfied the first element of its prima facie case. It is also evident that the fifth element satisfied since Mr. Bailey, as Ms. Kaml's employer, had actual knowledge of sexual harassment.

The second and third elements require the Complainant to show that Ms. Kaml was subjected to unwelcome sexual harassment based on sex. In the Continental Can decision, the Minnesota Supreme Court defined verbal and physical sexual harassment to include "sexually motivated physical contacts, sexually derogatory statments and verbal sexual advances." Id. at 249. The Court held that the sexually derogatory statements and verbal sexual advance alleged by the plaintiff affected the conditions of her employment and that company had discriminated against the plaintiff on the basis of sex in violation of the MHRA by failing to take any action whatsoever in response t her complaints. Id. at 250. In a recent decision, the Minnesota Court of Appeals held that a discussion on one occasion, later reiterated in writing, was sufficient to support a finding that sexual harassment had occurred. In that situation, a supervisor revealed intimate details of his sex life to a female employee and asked her if she would be interested in taking nude photographs of him. Fore v. Health Dimensions Inc., 509 N.W.2d 557, 559 (Mi Ct. App. 1993). Because the employer took timely and appropriate action to the harassment by demanding the resignation of the administrator who committ the harassment, it was not liable under the MHRA.

The facts alleged in the case at bar are less severe than those in the Continental Can case but are more severe than those in the Fore case, since there was an explicit request by the owner of the business that an employee engage in sexual intercourse, a further statement by the owner that he could hardly keep his hands off of the employee and wanted to rip her shorts off, a final instruction that the employee should not wear shorts to work anymore Mr. Bailey's request for sexual favors from Ms. Kaml, his female employee, w clearly based upon Ms. Kaml's sex. There is no dispute that Ms. Kaml reject the request for sexual favors. These facts, if proven at the hearing, will constitute sufficient evidence that unwelcome sexual harassment occurred to satisfy the second and third elements of the prima facie case requirement. Thompson v. Campbell, 845 F. Supp. 665, 673 (D. Minn. 1994) **( )**.

The primary issue presented by the parties in this Motion for Summary Judgment is whether the fourth prima facie element is satisfied in this case i.e., whether the harassment affected a term, condition, or privilege of employment or created an intimidating, hostile, or offensive working environment. The Respondents emphasize that sexual harassment must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment in order to be actionable under the hostile environment theory. See, e.g., Klink v. Ramsey County, 397 N.W.2d 8 901 (Minn. Ct. App. 1986), citing Meritor Savings Bank v. Vinson, 477 U.S. 5 67 (1986). They assert that the single act of non-physical harassment complained of by Ms. Kaml is insufficient to satisfy the fourth element of t prima facie case requirement because it is neither sufficiently severe nor pervasive. **The Respondents further argue that the Complainant cannot proper rely on allegations by another employee, Andree Moser, regarding harassment establish that Ms. Kaml's workplace was a hostile work environment because M Kaml did not find out about Ms. Moser's allegations until after she quit working at the Campground.** The Complainant contends that a single incident sexual conduct may be sufficient to constitute sexual harassment and that th proper test is not the number of incidents that occurred but rather whether employee was subjected to sexual conduct which was sufficiently severe or pervasive to alter the conditions of her employment. **In addition, the Complainant contends that Ms. Moser's allegations must be considered in determining whether a sexually hostile atmosphere existed.**

The United States Supreme Court has recently held that the test in determining whether or not sexual harassment is severe or pervasive enough t create an objectively hostile or abusive work environment is whether or not reasonable person would find the environment hostile or abusive. Additional the victim must subjectively perceive the environment to be abusive in order for the conduct to actually alter the condition of the victim's employment. Harris v. Forklift Systems, Inc., ____ U.S. ____, 114 S. Ct. 367, 370 (1993) The test formulated by the Supreme Court thus has both objective and subject prongs. The Court further held that it is not necessary to find that the employee's psychological or physical well-being has been seriously affected order to find a hostile work environment. Id. at 370-71. The Court held th

> A discriminatorily abusive work environment, even one that does not seriously affect employeee's psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe and pervasive that it created a work environment abusive to employees because of their . . . gender offends Title VII's broad rule of workplace equality.

Harris, 114 S. Ct. at 370-71. The Court went on to further state that whet an environment is "hostile" or "abusive" can be determined only by looking a all the circumstances, including "the frequency of the discriminatory conduc its severity, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee work performance." Id. at 371.

In considering whether the fourth element of the prima facie case has b satisfied, it is appropriate to consider whether, in accordance with the EEO guidelines, there has been conduct in the workplace which "has the purpose o effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Burns McGregor Electronic Industries Incorporated, 959 F.2d at 564, citing 29 C.F § 1604.11(a)(3). The issue is whether or not Mr. Bailey's conduct toward Ms Kaml was so severe or pervasive that it created an abusive working environment. Burns, 955 F.2d at 564. The determination of whether such an environment exists must be made by the trier of fact in light of the record a whole and the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. Id. at 56 29 C.F.R. § 1604.11(b).

Contrary to the assertions in the Respondent's Summary Judgment memoran it is not necessary for a sexual battery to occur before one incident can be sufficient for purposes of sexual harassment. See, e.g., Canada v. Boyd Gro Inc., 809 F.Supp. 771, 776 n. 1 (D. Nev. 1992) ("there is no basis for Defendants to argue that such touching [of "personal parts"] is in any way necessary in order for Plaintiff to establish a prima facie case of hostile environment sexual harassment").

In Thompson v. Campbell, none of the alleged sexual remarks were directed toward the employee. Nor was their evidence that the alleged harassment substantially interfered with the employee's employment. Campbell, 845 F. Supp. at 673, 674. The employee was not physically threatened or personally humiliated by the co-worker's conduct. Id. at 673.

Neither the Minnesota Supreme Court nor the Eighth Circuit has addres the issue of whether direct sexual advances by an employer to an employee al with changes in the conditions of the employment would constitute a hostile working environment.

The Administrative Law Judge finds the decisions in the Ninth Circuit t be instructive in this case. In Allison v. Brady, 924 F.2d (9th Cir. 1991), the court, faced with a fact situation analogous to the present case, found that there was a hostile working environment. In that decision, a male

employee asked a female employee out to lunch, which she refused. Subsequently, he wrote her a note which stated:

> I cried over you last night and I'm totally drained today. I have never been in such constant turm oil (sic). Thank you for talking with me. I could not stand to feel your hatred for another day.

Id at 874. The female employee was shocked and frightened by the note. The male employee demanded to speak with the female employee, but she left the building. Id. at 874. Several days later, the male employee sent the female employee a letter stating: "I know that you are worth knowing with or without sex . . . . " Id at 874. These two letters constituted the pattern of sexual harassment. The **trial court** held that the male employee's conduct was "isolated and genuinely trivial". Id. at 876. **On appeal, the Ninth Circuit reversed**. The Ninth Circuit quoted EEOC guidelines which contain substantially the same language as Minn. Stat. § 363.01, subd. 41, which states that "sexual harassment violates Title VII when conduct creates an intimidating, hostile, or offensive environment **or** where it unreasonably interferes with work performance." Brady, 924 F.2d at 877, citing 29 C.F.R. § 1604.11(a)(3). The Ninth Circuit held that conduct which unreasonably interferes with work performance can alter a condition of employment and create an abusive working environment. Brady at 877. The court held that the employee's conduct fell somewhere between forcible rape and the mere utterance of an epithet. Brady 924 F.2d at 877; citing Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) at 67. The Ninth Circuit held that it would apply a reasonable woman standard as men and women may react differently to certain words or actions. Id at 878-879. The court stated that "because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Brady, 924 F.2d at 879. Accordingly, the court held that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Brady at 879.

The Resopondent argues that the harassment was not extensive or prolonged enough to create a hostile environment. Contrary to the assertions in the Respondent's Summary Judgment memorandum it is not necessary for a sexual battery to occur before one incident can be sufficient for purposes of sexual harassment. As set forth in a Second Ciruit opinion:

> A female employee need not subject herself to an extended period of demeaning and degrading provocation before being entitled to seek the remedies provided under Title VII. It is not how long the sexual innuendos, slurs, verbal assaults, or obnoxious course of conduct lasts. The offensiveness of the individual actions complained of is

> also a factor to be considered in determining whether such actions are pervasive.

Carrerro v. New York City Housing Authority, 890 F.2d 569, 578 (2d Cir. **19XX**

Applying the reasoning in the Ninth and Second Circuit opinions, which consistent with the rationale set forth in the recent U.S. Supreme Court Ha decision, the Administrative Law Judge has determined that the Complainant h set forth a prima facie case of sexual harassment under the hostile work environment theory. The Respondent's request for sexual favors from his employee, followed by the statement that he wanted to rip her shorts off, an then stating she should no longer wear her shorts to work, are sufficiently offensive, demeaning and degrading from the standpoint of a reasonable perso to have the effect of substantially interfering with that person's employmen Ms. Kaml's inability to work for several days after the sexual harassment, a her unsuccessful attempt to return to work for the remainder of the season demonstrate her subjective belief that the work environment was abusive. **Su interference creates an intimidating, hostile, or offensive work environment** This is especially the case where it is the owner of the business who is sexually harassing the employee. Due to the employee's inability in such situations to complain about the harassment to a higher ranking employee, th employee may have no choice but to resign from her position.

Mr. Bailey's alleged criticism of Ms. Kaml's job performance and his alleged removal of her more demanding duties after the August 12 incident also suppo a finding of a hostile work environment. Accordingly, viewing the evidence most favorabley for the Plaintiff, the fourth element has been satisfied.

The Respondent has also requested a Motion for Summary Judgment stating that this is not a case of "quid pro quo sexual harassment". Quid quo harassment has been defined as sexual harassment that is directly linked the grant or denial of economic factors in employment. Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986). Minn. Stat. § 363.03(2)(b)(c) relat to both quid pro quo sexual harassment, as well as sexual harassment in a hostile working environment. The issue under this claim is whether or not t employer is attempting to exert pressure to obtain sexual favors in exchange for economic benefits to the employee. In a Ninth Circuit decision, the cou found that a prima facie case of quid pro quo sexual harassment had not been established when the only employee benefits that were affected was the employee's inability to leave early on some occasions and to have others wor her shifts. Canada v. Boyd Group, Inc., 809 F. Supp. 771, 777 (D. Nev. 1992 On the other extreme, when an employer discharges an employee for failing to accept sexual favors, then a quid pro quo case is established. Johnson v. Indopco, Inc., 846 F. Supp. 670 (N. Del. 1994).

The present case presents facts that are somewhere in between those two extremes. The issue is whether or not Mr. Bailey used Ms. Kaml's negative

reaction to his request for sexual favors as the basis for a decision concerning a tangible aspect of Ms. Kaml's compensation, terms, conditions, privileges of employment. Huitt v. Market Street Hotel Corp., 62 FEP 539, 5 citing Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982). In a Second Circuit decision, the court found that a quid pro quo claim had been established when the employee refused to submit to sexual demands and her complaints against the supervisor resulted in deficient training, and an unf evaluation of her work and a subsequent demotion. Carrero v. New York City Housing Authority, 890 F.2d 569, 579 (2nd Cir. 1989). The court furthe held that a hostile environment and quid pro quo harassment causes of actior are not always clearly distinct and separate. Id at 579. In that case, the hostile environment resulted in a deprivation of the fair and equal opportun for the complainant to succeed at her position as an assistant superintender The court went on to state that the gravamen of a quid pro quo claim is that tangible job benefit or privilege is conditioned on an employee's submission sexual blackmail and that adverse consequences flow from the employee's refusal. Carrerro, 890 F.2d 569 at 579.

In this proceeding, the Complainant has established a prima facie case that Ms. Kaml's job responsibilities were reduced after the alleged sexual harassment occurred. The change in the conditions of her employment affecte her privilege of employment. Looking at the evidence most favorably for the Complainant, this Administrative Law Judge finds that the Complainant has established a prima facie case for both quid pro quo sexual harassment and sexual harassment creating a hostile work environment subtantially interferi with the employee's individual employment.

B.L.N.

October 11, 1994

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Re: State of Minnesota, by David Beaulieu, Commissioner, Department of Human Rights, Complainant, vs. Jack Bailey and Oralee J. Bailey, d/b/a Union Lake Sarah Campground, Respondent; OAH Docket No. 11-1700-8904-2

Dear Counsel:

Enclosed and served upon you is a copy of the Prehearing Order of the Administrative Law Judge in the above-entitled matter.

The Prehearing Order specifies that the hearing will be held in the same location as was previously set forth in the original Notice of and Order for Hearing. I am asking Ms. Kircher to confirm that the same room remains available in the Polk County Courthouse, and that she notify me as soon as possible if any change in the hearing location is necessary.

Very truly yours,

BARBARA L. NEILSON
Administrative Law Judge

Telephone: 612/341-7604

BLN/lr
Enclosure